No. 84-58

IN THE

Supreme Court of the United States

October Term, 1984

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

BENNY K. CHAFFIN,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Supreme Judicial District of the State of Texas, at Texarkana, Texas

PETITIONER'S REPLY BRIEF

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Respondent opposes certiorari on the mistaken assumption that the petitioner railroad has raised and preserved for review only the now-mooted question whether inflation can ever be factored into the computation of FELA damage awards. All the Questions Presented in the petition are said to have been waived or not preserved for review. Therefore, respondent claims, this Court "would have nothing to review" if certiorari were granted. Opp Br. 8.

Respondent's error lies in his refusal to recognize that the controlling federal rule respecting inflation testimony was drastically altered during the course of this proceeding. At the trial level, no evidence as to inflation was admissible (the *Penrod* rule). At the intermediate appellate level, the *Penrod* rule was abandoned and the *Culver I* in-

flation methodology was substituted. At the final appellate level, the *Culver I* methodology was abandoned in favor of a new *Culver II* methodology. Despite repeated efforts by petitioner to call the attention of the Texas appellate courts to these changing federal methodologies and to the intention of the Fifth Circuit that the new rules be applied retroactively to cases like the instant one, the Texas courts remained mute.

Significantly, respondent does not claim – and cannot claim – that the petitioner failed to raise or preserve the *Culver I* and the *Culver II* propositions at the appropriate points in these proceedings. Nor does the respondent assert that either the Texas Court of Appeals or the Texas Supreme Court ruled that the petitioner had waived or failed to preserve those federal propositions; indeed, the respondent made no waiver claims whatever in the courts below. Thus it cannot be said that the judicial action below rests on any adequate or independent state procedural ground.

In the circumstances of this federal cause of action, the refusal of the Texas appellate courts to address or resolve the *Culver I* and *Culver II* questions raised by the petitioner has "the necessary effect" of denying those properly raised claims. *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928). Compare *Lear, Inc. v. Adkins,* 395 U.S. 653, 662 n. 10 (1969), stating that this Court "clearly" has jurisdiction to review a state court's determination of a decisive issue of federal law as well as a "duty" to consider and vindicate a petitioner's federal claim on grounds somewhat different than advanced below where "matters of basic principles are at stake." The Questions Presented in this case are not significantly different from those presented to the appellate courts below; and there are certainly matters of basic principles at stake with respect

to the uniform administration of the FELA among federal and state courts.

To be more specific about some of the respondent's contentions, the petitioner calls the Court's attention to the following sequence of events:

(1) **The Penrod objection at trial.** Although he does not now acknowledge it, the respondent at the trial in November 1981 stipulated that petitioner "may have a continuing objection to any evidence adduced on inflation." S.F. 284; compare Opp. Br. 3. Petitioner had to make the objection by force of the then prevailing *Penrod* rule, announced by the Fifth Circuit in 1975, which dictated that juries not be permitted to consider "future inflationary or deflationary trends in computing future lost earnings." 510 F.2d at 241.

(2) **Penrod's applicability to this trial.** Contrary to the respondent's suggestion (Opp. Br. 4), the trial court's action in admitting inflation testimony was not justified by certain favorable dicta in this Court's opinion in *Norfolk & Western R. Co. v. Liepelt,* 444 U.S. 490, 494 (1980), or by what respondent states "was emerging at the time as the majority rule amongst the circuits." The fact is that the *Penrod* rule was in effect in all courts within the circuit at the time of this trial in 1981. Just months before the trial, the Fifth Circuit on two occasions announced that "Liepelt's favorable dicta is only that" and that until "the Supreme Court speaks more directly or we, as an en banc court, decide otherwise, *Penrod* still applies . . ." *Byrd v. Reederei,* 638 F.2d 1300, 1308 (5th Cir. 1981); *Culver v. Slater Boat Co.,* 644 F.2d 460, 463 (5th Cir. 1981).

(3) **Respondent's "Catch-22" contention.** Respondent argues that petitioner waived its objections to the inflation

evidence that respondent introduced at trial, inasmuch as petitioner "elected not to rebut this testimony, or object to the methods used by Respondent's expert in reaching his conclusions." Opp. Br. 4-5. This is a classic "Catch-22" argument. The most elementary procedural rules teach that had petitioner sought to contradict such testimony, its *Penrod* objection would have been waived[1] and its right to appeal on the basis of the then prevailing federal law would have been forfeited. On the other hand, if petitioner had maintained its *Penrod* position at trial, as it did, respondent would force petitioner to waive its right to take advantage of the post-trial overruling of *Penrod* and of the retroactive application of the *Culver I* and *Culver II* methodologies.

Such an argument serves to highlight the procedural unfairness that results when state appellate courts, in a federal case in which damages are the only issue, decline to follow changes in the controlling federal law of damages that occur while an appeal is still *sub judice*. And in light of the Fifth Circuit's repeated insistence that the *Penrod* rule be followed at the time of this trial, respondent's remark that "almost any fool could have seen [that] the

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[1]Respondent misreads the Texas evidentiary rule on waiver. The leading text on the Texas rule, relied upon by both petitioner and respondent, states: "Where a party has objected to evidence of a particular fact and later produces evidence from his own witnesses of the same fact he will be deemed to have waived his objection." 1 R. Ray, *Texas Law of Evidence*, Sec. 27, at 36 (3d ed. 1980). Thus had the petitioner countered Dr. Funderburk's testimony as to inflation with its own expert economic witness, petitioner would have waived the continuing objection to the introduction of all evidence as to inflation.

But the same Texas authority states that mere "cross-examination of his adversary's witness [i.e., Dr. Funderburk] about the same matter will not be treated as waiver." *Id.*, at 37. Thus petitioner's cross-examination of Dr. Funderburk did not constitute a waiver of the continuing *Penrod* objection.

carcass of *Penrod* was headed for . . . [the] grave" (Opp. Br. 5) does nothing to advance respondent's argument that petitioner should have foreseen the overruling of *Penrod* and taken proper steps to build its case and its claims around one of the unborn methodologies.

(4) **The Penrod rule on the appeal.** Respondent ignores the fact that the *Penrod* rule remained in effect for some time after the trial and during the initial phases of the appeal period. That explains why the petitioner pursued its *Penrod* objection in its briefs and oral argument before the Texas Court of Appeals.[2] See Opp. Br. 3-4. The overruling of *Penrod* did not occur until *after* this case had been briefed and argued on the appeal. And when *Culver I* announced that *Penrod* was overruled, the parties promptly brought *Culver I* to the attention of the Texas Court of Appeals. That court affirmed the trial court's violation of *Penrod* by reference to that portion of *Culver I* that overruled *Penrod;* but the remaining portions of *Culver I* that established a new rule of admissibility of inflation evidence were ignored by the Texas Court of Appeals.

(5) **The Culver I phase of the appeal.** The new *Culver I* methodology, announced on September 22, 1982, remained the controlling federal rule throughout the remainder of the pendency of the appeal of this case to the Texas Court of Appeals. Also, during that pendency, this Court's decision in *Jones & Laughlin Steel Corp. v. Pfeifer,* 103 S.Ct. 2541 (June 15, 1983), was announced and was brought to the attention of the Texas court. But the Texas court made no effort in its decision of July 19,

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[2]Had *Penrod* not been overruled during the course of the appeal of this case, the Texas Court of Appeals doubtless would have reversed the trial court's action in admitting Dr. Funderburk's inflation testimony and in allowing the jury to consider such testimony. Such action was contrary to the *Penrod* command.

1983, or in the course of denying rehearing on August 16, 1983, to apply the *Culver I* or the *Pfeifer* principles to the facts of this case or to order a new trial in accordance with those principles. That inaction by the Texas Court of Appeals creates some of the issues that petitioner now puts to this Court, issues that could not have been anticipated or raised at the trial court level but that were raised in the petition for rehearing in the Texas Court of Appeals. See *Brinkerhoff-Faris Trust Co. v. Hill,* 281 U.S. 673, 677-678 (1930).

(6) **The Culver II phase of the appeal.** On December 22, 1983, while petitioner was seeking to invoke the review jurisdiction of the Texas Supreme Court, the Fifth Circuit decided *Culver II.* The *en banc* Fifth Circuit there repudiated the use of the *Culver I* "case-by-case" methodology in jury trials within the circuit, and mandated the use of the "below-market discount" method. *Culver II* also directed that the new methodology be applied retroactively to all cases still on appeal in which the principles of *Culver I* had not been presented to the jury by instructions or employed by the trial judge in findings of fact fixing damages. 722 F.2d at 123. The instant case fits that description.

Petitioner accordingly raised both *Culver I* and *Culver II* issues in its application to the Texas Supreme Court for a writ of error. And when the court denied the application with the notation "no reversible error," petitioner renewed those contentions in a petition for rehearing.

Basically, the questions presented to this Court were generated during the course of the appellate rather than the trial proceedings in this case, compounded by the

parallel circumstance of dramatic changes in the controlling federal rule of damage calculation. How should the state courts react to those changes in federal law? Does the principle of uniformity in the administration of the FELA demand that state court judgments on appeal be modified to conform to new methodologies for assessing the impact of future inflation on the computation of lost lifetime earning power? Should the single methodology selected for jury trials by *Culver II* be applied retroactively? The Fifth Circuit has already answered that question affirmatively in a case tried in federal court. See *Martin v. Missouri Pacific R.Co.*, 732 F.2d 435 (5th Cir. 1984). How can there be a contrary rule for an FELA case tried in a state court? All of these questions have been properly raised and preserved by petitioner, questions that are the product of the conflicting federal and state appellate determinations.

CONCLUSION

For these reasons, responsive to the arguments raised in opposition, certiorari should be granted. As three commentators have recently noted, *Pfeifer* and *Culver II* "have placed plaintiffs and defendants on a more equitable footing and have moved the trial of damages away from a 'graduate seminar on economic forecasting' toward a more workable standard – a method that should serve the goals of judicial efficiency and predictability of awards." George, Simien and Culbertson, *The Courts and Inflation*

— *Two Case Studies: Pfeifer and Culver II,* 20 Trial 22 at 26 (No. 7, July 1984). This case is an appropriate vehicle for assuring that the *Pfeifer* and *Culver II* goals apply equally to FELA jury trials occurring in state courts.

Respectfully submitted,

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